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No. 06-

IN THE
SUPREME COURT OF THE UNITED STATES

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Petitioner,

-against-

TOM F., on behalf of GILBERT F., a minor child,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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November 1, 2006

QUESTION PRESENTED

Does the holding of the United States Court of Appeals for the Second Circuit, stating that the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency, stand in direct contradiction to the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes tuition reimbursement to the parents of a disabled child "who previously received special education and related services under the authority of a public agency"?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINION BELOW

The summary order of the United States Court of Appeals for the Second Circuit from which petitioner Board of Education of the City of New York ("Board" or "petitioner")[1] seeks certiorari, was issued on August 9, 2006. The order was not reported but may be accessed at 2006 U.S. App. LEXIS 209611 and appears in the

[1] The former Board of Education is presently known as the Department of Education.

Appendix at p. 14. The summary order vacated and remanded for further proceedings the judgment of the District Court in light of the Second Circuit's decision in *Frank G. v. Bd. Of Education*, No. 04-4981, 2006 U.S. App. LEXIS 19029.

The Second Circuit's August 9, 2006 order followed an appeal from an opinion and order of the United States District Court for the Southern District of New York (Daniels, U.S.D.J.), filed January 4, 2005, which granted as a matter of law the summary judgment motion of plaintiff-appellee Board dated March 25, 2002, and dismissed all of the claims of respondent Tom F. The District Court order appears in the Appendix at p. 1.

A grant of certiorari in this case would also bring up for review the Second Circuit's opinion and order (one paper) of July 27, 2006, in the matter of *Frank G. v. Bd. Of Education*, No. 04-4981, 2006 U.S. App. LEXIS 19029 which held, *inter alia*, that the Individuals with Disabilities Education Act permits tuition reimbursement under circumstances where the child has not previously received special education from a public agency. That order affirmed a judgment of the United States District Court for the Southern District of New York which ordered the defendant Board of Education of Hyde Park, Central School District ("Hyde Park") to reimburse plaintiffs Frank G. and Dianne G., parents of a disabled student Anthony G., for tuition where the private school selected by the parents was found to be appropriate under the IDEA. In that matter, petitioner Hyde Park has also sought certiorari.

JURISDICTION

The Second Circuit issued the summary order from which the City seeks certiorari on August 9, 2006. No petition for rehearing was filed in this case. This Court has jurisdiction to review this summary order under 28 U.S.C. §1254.

STATUTORY PROVISION

The relevant provision of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq*., which is contained in § 1412(a)(10)(C)(ii),[2] states as follows:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment (emphasis supplied).

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[2] See Appendix at p. 16.

SUMMARY OF THE ARGUMENT

Petitioner takes the position that 20 U.S.C. § 1412(a)(10)(C)(ii) unambiguously precludes tuition reimbursement in situations where the public agency has made a free appropriate public education available to a student with a disability and where the parent has unilaterally enrolled the student in private school without first trying the public school special educational placement.

STATEMENT OF THE CASE

A. Nature Of The Case.

Petitioner filed an action in the Southern District of New York under the IDEA, seeking to overturn local and state administrative determinations that petitioner was required to reimburse respondent the cost of his son's private school tuition. The District Court reversed the administrative determinations on the ground that reimbursement was barred by 20 U.S.C. § 1412(a)(10)(C)(ii).

On appeal, the Second Circuit vacated the District Court's judgment and remanded the matter for further proceedings in light of its decision in *Frank G. v. Bd. Of Educ.*, No. 04-4981, __ F.3d __, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006) that the reimbursement of tuition in that case was not barred by 20 U.S.C. § 1412(a)(10)(C)(ii).

B. Statement Of Relevant Facts.

1. Overview of the IDEA

The IDEA was enacted by Congress to assure that all children with disabilities have available to them a free appropriate public education ("FAPE") which emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(c).

The City School District of the City of New York ("District") is a public school district duly organized, existing and operating consistent with the Education Law of the State of New York. *See* N.Y. Educ. Law § 1804 (McKinney Supp. 2005). Under the IDEA, the District is a "local educational agency," *see* 20 U.S.C. § 1401(15)(A), responsible for the identification and evaluation of children with disabilities residing within its territorial boundaries. *See* 20 U.S.C. § 1412(a)(3)(A).

Upon identification, the District bears the responsibility of providing resident children between the ages of three and twenty-one with a "free appropriate public education." *See* 20 U.S.C. § 1412(a)(1)(A).

A free appropriate public education is designed through the collaboration of the parents and teachers of the disabled child, and the school district administrators, and is recorded in an individualized education program ("IEP"). *See* 20 U.S.C. § 1414(d). The IEP is a comprehensive statement of the educational needs of the disabled child and the specially designed instruction and related services to be used to meet the child's needs. In New York State, the IEP is produced by a Committee on Special Education. The members of the Committee on Special Education are appointed by the board of education or trustees of the school district. *See* N.Y. Educ. Law § 4402(1)(b)(1) (McKinney Supp. 2005).

To accomplish its goals, "the IDEA requires that states [receiving certain federal funds] offer parents of a disabled child an array of procedural safeguards designed to help ensure the education of their child." *Polera v. Board of Education of the Newburgh Enlarged City School District*, 288 F.3d 478, 482 (2d Cir. 2002). Under the IDEA, a parent may "present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6). "[P]arents involved in such complaint shall have an opportunity for an impartial due process hearing." 20 U.S.C. §1415(f)(1). Under New York State law, the due process hearing is conducted by a hearing officer who is appointed by the local board of education. *See* N.Y. Educ. Law § 4404(1) (McKinney Supp. 2005).

Generally, "no private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school." 34 C.F.R. § 300.454(a). The IDEA provides that the local school district is not required to pay for the cost of education of a child with a disability at a private school or facility if the agency made a free appropriate public education available to the child and the parent elected to place the child in such private school or facility. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403.

Except under limited circumstances, the IDEA does not require school districts to pay for tuition at private schools. *See Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004). This Court has instructed that when a parent unilaterally withdraws the child from the public school and seeks tuition reimbursement for the child's private placement, the parent does so at his or her

own peril. *See School Comm. Of Burlington v. Department of Educ.*, 471 U.S. 359, 373-374 (1985).

2. Local and State Administrative Proceedings in the Instant Case

Tom F. ("respondent") is the parent of a child, Gilbert F. ("student"), who resides in the Board's School District. The student was born on October 1, 1989, and has never received special education services from the Board or any other public agency. Since the time that the student was eligible to receive public education in 1995, the student has attended a private school that is unapproved by the Commissioner of Education of the State of New York for the provision of special education services to students with disabilities (A1).[3]

On June 23, 1999, the Board's Committee on Special Education ("CSE") conducted an annual evaluation to determine the student's appropriate educational placement for the 1999-2000 school year. After reviewing several evaluations conducted by the CSE in preparation for the student's annual report, the CSE recommended that the student continue to be classified as learning disabled and be placed in a Modified Instructional Services – I ("MIS-I") program with a teacher ratio of 15:1. The student's Final Notice of Recommendation, recommending the student's placement at P.S. 871, known as the New York City Lower Lab School for Gifted Education, was sent to respondent parent on July 29, 1999 (A1-3).

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[3] Unless otherwise indicated, numbers in parentheses preceded by the letter "A" refer to page numbers of the Appendix.

Respondent never visited the school, never met with any representatives from the school, and never met with the placement officer at the CSE. Respondent acknowledged that he has never visited any public school placement that the CSE has offered the student in the past. Respondent further admitted that he had already decided to again enroll the student in private school and had tendered a down payment to that school.

Although the Board made a free appropriate public education available to the student, respondent parent rejected the placement and chose to continue the student's private school placement for the 1999-2000 school year. Respondent thereafter brought an administrative hearing against the Board and requested an impartial hearing seeking tuition reimbursement for his unilateral placement of the student in private school for the 1999-2000 year (A3).

On April 6, 2001, the Impartial Hearing Officer ("IHO") issued his Findings of Fact and Decision, and found that the Board did not meet its burden of showing that its recommendation was appropriate. The IHO also determined that the private school provided an appropriate program for the student and ordered the Board to reimburse Appellant for the cost of the student's private school tuition. The Board appealed the IHO's decision to the State Education Department State Review Officer ("SRO"), arguing that pursuant to the IDEA, tuition reimbursement was limited to parents of a child with a disability, who previously received special education and related services under the authority of a public agency (A3).

The SRO issued a decision granting respondent's request for tuition reimbursement and dismissing the Board's appeal on March 30, 2001. In doing so, the SRO determined, *inter alia*, that the Board failed to demonstrate that its recommended placement was appropriate. The

SRO also concluded that the CSE was improperly constituted and consequently resulted in an inappropriate placement (A3).

C. The Complaint.

On July 26, 2001, the Board filed a complaint in the instant action, challenging the SRO's decision which granted appellant's tuition reimbursement for the 1999-2000 school year. The complaint asserted one claim, seeking redress for an award of full-tuition reimbursement for the 1999-2000 school year, reversal of the March 30, 2001 decision of the SRO finding that the Board failed to demonstrate that there was a validly composed CSE at the June 23, 1999 meeting and also finding that equities required reimbursing the parent for full tuition because the parent cooperated with the CSE.

D. Motion And Cross-Motion For Summary Judgment.

By notice of motion dated March 25, 2002, the Board moved for a summary judgment order granting the relief sought in the amended complaint.

By notice of cross-motion dated May 6, 2002, the respondent moved for summary judgment in its favor.

E. District Court's Order Granting Summary Judgment To The Board.

On January 3, 2005, Judge Daniels issued a memorandum and order (one paper) granting summary judgment in favor of plaintiff and dismissing all of respondent's claims. In those rulings, he granted the

Board's motion for judgment as a matter of law, finding that

> "Interpretation of this provision is an issue of first-impression in this circuit. The clear implication of the plain language, however, is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school (emphasis in original)."

The District Court also noted that respondent "advocates departure from the plain language of the statute on grounds that adhering to its literal interpretation would defeat the statute's very purpose. This contention is without merit." The District Court also determined that

> "[a]s [the Board] suggests, the provision ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate. Therefore, it cannot be said that adherence to the plain language would defeat the purpose of the IDEA to provide every child with a disability a free and appropriate public education (citation omitted)."

F. The Decision Of The United States Court Of Appeals For The Second Circuit.

In an unreported summary order dated August 9, 2006, the Court of Appeals for the Second Circuit reversed the District Court order (A14). *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F., a minor child*, 2006 U.S. App. LEXIS 20961 (2nd Cir. 2006). The Second Circuit's summary order stated that:

> Upon due consideration, it is hereby ordered, adjudged and decreed that the judgment of district court be, and it hereby is, vacated and remanded for further proceedings in light of this Court's decision in Frank G. v. Bd. Of Educ., No. 04-4981, __ F.3d __, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006).

REASONS FOR GRANTING THE PETITION

This petition raises a compelling question of vital importance to parents, children, and local and state school districts nationwide, regarding whether tuition reimbursement is available under the IDEA to the parent of a child who has never previously received special education and related services from a public agency and who unilaterally enrolled the child in private school.

The Second Circuit's conclusion that tuition reimbursement is available under the IDEA to the parent of a child who has never previously received special education and related services from a public agency is untenable for the following reasons:

(1) the Second Circuit Court of Appeals has entered a decision in conflict with relevant decisions of other federal courts, including the decision of the First Circuit Court of Appeals which interpreted the same statute and addressed the same important issue; and

(2) the Second Circuit's decision conflicts with the clear and unambiguous plain language of 20 U.S.C. § 1412(a)(10)(C)(ii), which limits the availability of tuition reimbursement to situations where the student has previously received special education and related services from a public agency; and

(3) the Second Circuit's decision also conflicts with a recent decision of this Court in *Arlington v. Murphy*, __ U.S. __, 126 S. Ct. 2455, 2463 (2006).

A. The Second Circuit's Holding That 20 U.S.C. § 1412(a)(10)(C)(ii) Does Not Preclude Tuition Reimbursement Where The Student Has Not Previously Received Special Education And Related Services From A Public Agency.

In its decision of August 9, 2006, the Second Circuit vacated the judgment of the district court and remanded the matter for further proceedings in light of its decision in *Frank G. v. Board of Education of Hyde Park*, No. 04-4981, ___ F.3d ___, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006). *Frank G.* held, in relevant part, that

> "[t]he plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is only available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services (emphasis in original)."

The Second Circuit, reasoning that the statutory language was ambiguous, resorted to rules of statutory construction for the stated reason of avoiding what it viewed as an absurd result. The Second Circuit looked to the "primary purpose" of the statute and focused upon the "broader context" of the statute, and found that the issue involved an ambiguity created by different sections of the IDEA instead of the interpretation of an ambiguous word or phrase.

Having applied rules of statutory construction, the Second Circuit noted that the purpose of the IDEA is to

ensure the availability of a free appropriate public education to all children with disabilities. Relying upon 20 U.S.C. § 1412(i)(2)(C), the Second Circuit noted further that the statute's purpose is accomplished by the conferring of broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who unilaterally place the children in private school where the private placement is determined to be proper and the proposed IEP is determined to be inadequate. Finally, the Second Circuit found that the Hyde Park School District's interpretation of 20 U.S.C. § 1412 (a)(10)(C)(ii) would produce the absurd result of placing the parents of children with disabilities in the position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement.

The Second Circuit also found that its interpretation was consistent with the interpretation found in an informal letter issued by the United States Department of Education's Office of Special Education and Rehabilitative Services.

We vigorously dispute the conclusion that the plain language of the statute permits tuition reimbursement to the parent of a child who has never previously received special education and related services from a public agency.

Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States v. Albertini*, 472 U.S. 675, 680 (1985). Congress could have made explicit in the statutory language of the IDEA that tuition reimbursement would be available to the parent of a child who has never previously received special

education and related services from a public agency, but Congress did not do so.

20 U.S.C. § 1412 (a)(10)(C)(ii) was added to the IDEA as part of the 1997 amendments. The Second Circuit's interpretation of 20 U.S.C. § 1412 (a)(10)(C)(ii) renders the language "previously received special education and related services" a nullity, and, consequently, the decision conflicts with the rule of statutory construction which requires that interpretations of statutes that render statutory language superfluous are to be disfavored. *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992) (courts must presume that a legislature says in a statute what it means and means in a statute what it says there).

B. Conflict With The Court of Appeals For The First Circuit.

One of the major reasons that certiorari should be granted on the question presented to this Court is that the Second Circuit openly disagrees with the analysis of the First Circuit in *Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004). The Second Circuit in this case has gone beyond the plain language of the 1997 amendments to the IDEA, which provides, in pertinent part:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment

> if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii).

The holding of the Second Circuit in *Frank G.* that a parent whose child has not previously received special education or related services from a public entity, and who unilaterally placed the child in private school, may be reimbursed for private school tuition where the public entity has provided a free appropriate public education is in direct conflict with the holding of the First Circuit, which held that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) creates a threshold requirement that tuition reimbursement is only available for children who have previously received special education and related services while in the public school system. *See Greenland School District v. Amy N.*, 358 F.3d 150, 159-60 (1st Cir. 2004).

It appears that the Court of Appeals for the Eleventh Circuit agrees, at least in part, with the Second Circuit's analysis. In *M.M. ex rel C.M. v. School Board of Miami-Dade County*, 437 F3d 1085, 1098-99 (11th Cir. 2006), the Eleventh Circuit found that the child previously received auditory-verbal therapy and other special education services under the authority of a public agency, but also held that the school board's interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) would bar children from receiving a FAPE because their disabilities were detected before they reached school age and would additionally place the parents of such children in the position of acquiescing to an inappropriate placement in order to preserve their right to placement.

In order to avoid certain confusion in the Second Circuit and throughout the Circuits, this Court must clarify for litigants in IDEA actions whether or not tuition reimbursement is available to parents whose children have not previously received special education and related services from the public agency under circumstances where said parents unilaterally place their children in private school although the public agency has made available a free appropriate public education.

We submit that the clear meaning of the plain language of the statute is that where a child has not previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from the parent's unilateral placement of the child in private school. The Second Circuit decision sets a precedent in that it enables the parent of a child who has never previously received special education from a public agency to receive tuition reimbursement where the parent has unilaterally enrolled the child in a private elementary or secondary school, without the consent of or referral by the public agency. The IDEA contains no explicit statutory authority for tuition reimbursement under the factual situation presented here.

The practical effect of the Second Circuit holding that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is only available to parents whose child had previously received special education and related services from a public agency creates unnecessary confusion among public school districts as well as parents of children who need special education and related services. Accordingly, the determination as to whether the Second Circuit has correctly interpreted the statute is significantly consequential in this case.

C. Conflict With The Policy Considerations Underlying The IDEA's Enactment.

Public policy does not require that the parents of children who require special education and related services be reimbursed for unilaterally placing those children in private school when the public agency has provided a free appropriate public education.

The 1997 amendments to the IDEA reinforced the principle that children should not be unnecessarily removed from regular educational environments. 20 U.S.C. § 1412(a)(5)(A). This was accomplished, in part, by the elimination of "inappropriate financial incentives for referring children to special education." H.R. Rep. 105-95, at 90 (1997), reprinted in 1997 U.S.C.C.A.N. 78, 87. It may not be disputed that one specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. *Id.* at 91-92.

The 1997 amendments added a section to the IDEA entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). See H.R. Rep. 105-95, at 93, reprinted in 1997 U.S.C.C.A.N. 78, 90. 20 U.S.C. § 1412(a)(10)(C) begins with a policy statement which explains that the IDEA does not "require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).

D. Conflict With This Court's Decision In *Arlington v. Murphy*.

The Second Circuit, in interpreting 20 U.S.C. § 1412(a)(10)(C)(ii), left unmentioned that the IDEA was enacted by Congress pursuant to the Spending Clause. U.S. Const., Art. I, § 8, cl. 1. *See Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005). In *Schaffer v. Weast*, this Court noted that the IDEA is a Spending Clause statute that seek to ensure that all children with disabilities have available to them a free appropriate public education. The IDEA provides federal funds to assist state and local agencies in the education of children with disabilities, and the IDEA conditions that funding upon the state's compliance with goals and procedures. This Court has recently noted that when Congress attaches conditions to a state's acceptance of federal funds, those conditions must be unambiguously set out. *Arlington Central School District Board of Education v. Murphy*, __ U.S. __, 126 S. Ct. 2455 (2006). In the instant case, the Second Circuit's decision is inconsistent with this Court's decision in *Arlington*.

In sum, we respectfully request that this Court grant certiorari to address the question of whether 20 U.S.C. § 1412(a)(10)(C)(ii) requires that a child must have previously received special education and related services from the public agency in order to be eligible for tuition reimbursement where the parent has unilaterally placed the child in private school and where the public agency has made a free appropriate public education available to the child. The Second Circuit's view of the application of 20 U.S.C. § 1412(a)(10)(C)(ii) is in clear conflict with the plain language of the statute as well as with the view of other Circuit precedent.

CONCLUSION

For the reasons set forth, the City respectfully asks this Court to grant its petition for a writ of certiorari.

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Plaintiff,

01 Civ. 6845 (GBD)

-against-

TOM F., on behalf of GILBERT F., a minor child

Defendant.

MEMORANDUM AND ORDER

This matter is before the Court on cross-motions for summary judgment as to the State Education Department State Review Officer's (SRO) award of tuition reimbursement to Defendant. For the reasons set forth below, Plaintiff's motion for summary judgment reversing the award is granted, and Defendant's motion is denied.

I. Background

Many facts are undisputed. Defendant's son,

Gilbert F. ("student") has attended the Stephen Gaynor School ("Gaynor"), a private school, since kindergarten. On June 23, 1999, the Board of Education's Committee on Special Education ("CSE") conducted an annual review to determine the student's appropriate educational placement for the 1999-2000 school year. Seven people attended the CSE meeting, including an educational evaluator who signed the Individualized Education Program (IEP) as the special education teacher. The student's actual special education teacher from Gaynor was unavailable because she was in the hospital.

Following a review of several evaluations conducted by the CSE in preparation for the student's annual report, the CSE recommended that the student continue to be classified as learning disabled and that he be placed in a Modified Instructional Services- I ("MIS-I") program with a teacher ratio of 15:1. The CSE further recommended that the student receive speech/language therapy in a group twice per week and counseling in a

group once per week. The student's Final Notice of Recommendation was sent to Defendant on July 29, 1999, which placed the student at P.S. 871, a public school.

Nonetheless, Defendant continued the student's placement at Gaynor for the 1999-2000 school year and requested an impartial hearing to seek reimbursement for the cost of the student's tuition. On April 6, 2000, the Impartial Hearing Officer ("IHO") ordered the Board to reimburse Defendant for the cost of the student's tuition at Gaynor. The plaintiff, in turn, appealed to the State Education Department SRO, who affirmed the IHO's award of tuition reimbursement on grounds that the CSE was not validly constituted and, thus, resulted in an inappropriate placement.

Plaintiff now seeks to reverse the March 30, 2001 decision of the SRO granting Defendant tuition reimbursement on grounds that: (1) the IDEA precludes an award of tuition reimbursement in instances where a student has not previously received special education

services from a public agency; and (2) in any event, the CSE was properly constituted.

II. Discussion

A. Standard of Review

"Federal courts assess IDEA petitions based on the 'preponderance of the evidence developed at the administrative proceedings and any further evidence presented by the parties.'" M.S. v. Bd. of Educ., 231 F.3d 96, 102 (2d Cir. 2000) (quoting Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122-23 (2d Cir. 1998). However, this assessment is not an "invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982). When reviewing whether a proposed IEP is appropriate, the district court must give "due weight" to the findings of a state administrative proceeding. Id.

"[The Second Circuit] has acknowledged that 'Rowley requires that federal courts defer to the final

decision of state authorities.'" Muller v. Comm. on Special Educ., 145 F.3d 95, 102 (2d Cir. 1998) (quoting Karl v. Bd. of Educ., 736 F.2d 873, 877 (2d Cir. 1984). "[D]eference is owed to state and local agencies having expertise in the formulation of educational programs for the handicapped." Muller, 145 F.3d at 103 (quoting Briggs v. Bd. of Educ., 882 F.2d 688, 693 (2d Cir. 1989)).

Nonetheless, as Defendant acknowledges here, the Second Circuit has differentiated between those matters where the court has been called upon to judge whether a child has been offered a free and appropriate education, and matters of statutory interpretation. The line of cases that calls for deference to administrative proceedings addresses only the former situation. In contrast, where the issue facing the court is one of statutory interpretation, the district court may review the matter de novo. See Muller, 145 F.3d at 103 (approving of district court's de novo review of whether a school district appropriately classified a child's disability status because

resolution of the issue involved interpretation of the IDEA and applicable regulations). Under the latter circumstances, "state administrative officials [are] in no better position than the district court to make conclusions." Id.

Here, as in Muller, it is not the underlying facts that are in dispute, but rather the legal conclusions to be drawn from those facts. As a result, the concern that motivated the court in Rowley, of courts substituting their own notions of sound educational policy for those of school authorities, is not present. See Rowley, 458 U.S. at 206. As the issues here are ones of statutory interpretation, the SRO's determinations are to be reviewed de novo.

B. Defendant's Eligibility for Tuition Reimbursement

The Board of Education argues that Defendant is barred from tuition reimbursement under the IDEA because his child did not previously receive special education under the authority of a public agency. Defendant argues that despite the plain language of the statute to the contrary, he should be permitted to receive

tuition reimbursement because to hold otherwise would defeat the purpose of the IDEA.

In School Committee of Burlington v. Department of Education, the Supreme Court set forth the circumstances under which a parent who unilaterally enrolled a child in a private school could receive tuition reimbursement. 471 U.S. 359, 369-70. The Court did not limit the remedy to parents of children who previously received special education in a public school. However, Burlington predated the amendments to the IDEA made in 1997.

> The 1997 amendments to the IDEA provide, in pertinent part:
>
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to

> the child in a timely manner prior to that enrollment. (emphasis added).[1]

20 U.S.C. § 1412(a)(l0)(C).

Interpretation of this provision is an issue of first impression in this circuit. The clear implication of the plain language, however, is that where a child has *not* previously received special education from a public agency, there is no authority to reimburse the tuition expenses arising from a parent's unilateral placement of the child in private school.

The Court of Appeals for the First Circuit reached this conclusion in Greenland School District v. Amy N. 358 F.3d 150, 158-160 (2004). There, the parents of a child who had never received special education services in public school sought tuition reimbursement after having unilaterally removed the child from public school and placed her in private school. As in the instant case, the hearing officer ordered the school district to reimburse the

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[1] This language is reiterated in the applicable federal regulation. 34 C.F.R. §3000.403(c).

child's tuition. However, in affirming the district court's reversal of the hearing officer's holding, the Court of Appeals concluded that the amended provision limits tuition reimbursement to children "who have previously received 'special education and related services' while in the public school system (or perhaps those who at least timely requested such services while the child is in public school)." Id. at 159-160.

As neither threshold is satisfied here, the SRO's holding awarding tuition reimbursement to Defendant was erroneous.

Defendant advocates departure from the plain language of the statute on grounds that adhering to its literal interpretation would defeat the statute's very purpose. This contention is without merit. "Only the most extraordinary showing of a contrary intention from the legislative history would justify interpretive departure from a statute's plain language." O'Connell v. Hove, 22 F.3d 463, 470 (2d Cir. 1994). Here, however, evidence of

congressional intent from the legislative history is *consistent* with the plain meaning of the text. The relevant House Report from the Committee on Education and the Workforce states:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

House Report No. 105-95 (emphasis added).

As Plaintiff suggests, the provision ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been inappropriate. Therefore, it cannot be said that adherence to the plain language would defeat the purpose of the IDEA to provide

every child with a disability a free and appropriate public education. See 20 U.S.C. § 1400(d)(1)(A).

Finally, Defendant relies on an opinion given by the Office of Special Education Programs ("OSEP") in response to the question of whether the 1997 Amendments to the IDEA preclude private school tuition reimbursement for children who had not previously received special education from a public agency. OSEP concluded that it did "not appear that [this] question ... [was] answered by § 612(a)(10)(C) of IDEA '97." Letter to Luger, 33 I.D.E.L.R. 126 (March 19, 1999).

"[D]eference to an OSEP policy letter may be appropriate where statutory language is ambiguous." St. Johnsbury Acad. v. D.H., 240 F.3d 163, 171 (2d Cir. 2001) (quoting Honig v. Doe, 484 U.S. 305, 325 n.8 (1988); However, "if the intent of Congress is clear," a court reviewing an agency's construction of a statute that it administers "must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A. Inc. v.

Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984). Here, where there is no ambiguity in the statutory language, deference to the OSEP letter would be inappropriate. Therefore, this Court reaches the same conclusion as to the meaning of 20 U.S.C. § 1412(a)(10)(C) that the First Circuit reached in Amy N. See 358 F.3d at 158-160.

As the IDEA bars tuition reimbursement in the instant case, it is not necessary for the Court to address the issue of whether the educational evaluator properly served as the child's special education teacher such that the CSE was validly constituted.[2]

III. Conclusion

For the reasons set forth above, Plaintiff's motion for summary judgment reversing the SRO's grant of tuition reimbursement to Defendant is granted, and

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[2] The Declaration of Linda Wernikoff in Support of Plaintiff's Motion for Summary Judgment addressed issues pertinent only to this latter question. Therefore, Defendant's motion to strike the Declaration as improper is rendered moot.

Defendant's motion is denied. The Clerk is directed to close this case.

SO ORDERED.

Dated: New York, New York
January 3, 2005

U.S.D.J.
Hon. George B. Daniels

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 9th day of August, two thousand and six.

PRESENT

HON. AMALYA L. KEARSE,
HON. ROBERT D. SACK,
Circuit Judges,
HON. TIMOTHY C. STANCEU,*
Judge.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,
Plaintiff-Appellee,

v No. 05-0566

TOM F. on behalf of GILBERT F., a minor child,
Defendant-Appellant.

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* Of the United States Court of International Trade, sitting by designation.

Appearing for Appellant: Paul G. Gardephe, Patterson, Belknap, Webb & Tyler LLP (Alexis Gander, of counsel), New York, NY.

Appearing for Appellee: Michael A. Cardozo, Corporation Counsel of the City of New York (Edward F.X. Hart, Drake A. Colley, of counsel), New York, NY.

Appeal from the United States District Court for the Southern District of New York (George B. Daniels, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of district court be, and it hereby is, VACATED and REMANDED for further proceedings in light of this Court's decision in Frank G. v. Board of Education of Hyde Park, No. 04-4981, --- F.3d ---, 2006 WL 2077009, 2006 U.S. App. LEXIS 19029 (July 27, 2006).

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: _____

(ii) Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.